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Nos. 07-1428 & 08-328

In the Supreme Court of the United States

FRANK RICCI, *ET AL.*,

Petitioners,

v.

JOHN DESTEFANO, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

Amici's members are intimately involved in government entities' hiring and promotion decisions and, therefore, have substantial experience with disputes such as the one presented in this case. *Amici* file this brief to inform the Court of the dramatic practical consequences of the legal standards proposed by petitioners.

The International Municipal Lawyers Association (IMLA), a nonprofit nonpartisan organization comprising over 2,500 local government entities, including cities and counties, and their subdivisions, develops and advances solutions to important legal issues faced by local governments. IMLA represents the interests of local governments through amicus filings in this Court, the federal courts of appeals, and state appellate courts.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. NACo provides essential services to the nation's 3,068 counties through advocacy, education, and research.

The International Public Management Association for Human Resources is a professional association representing thousands of human resources professionals working for local, state, and federal governments. The Association provides information and

assistance to help these professionals increase their job performance and overall agency function.

As government employers, and the lawyers and human resources professionals who advise them with respect to challenges to employment-related decisions based on allegations of discrimination, *amici* have a strong interest in the recognition by this Court of a legal standard that will make it possible for local governments to resolve these disputes without in every case being required to expend scarce resources on expensive and time-consuming litigation.

SUMMARY OF ARGUMENT

Petitioners argue that a local government is obligated to utilize the results of an employment examination unless the examination violates Title VII or there is a "strong basis in evidence" of such a violation. The practical effect of that standard would be that—absent a judicial determination of the test's invalidity—a municipality will be compelled to utilize the results no matter how unjustifiable the questions contained in the test; no matter how disparate the burden on a particular racial, gender, or ethic group; and no matter how easily an alternative test with a significantly reduced disparate impact could be devised.

Because civil service laws require government entities to fill millions of jobs each year based on competitive examinations, petitioners' approach will mean exponentially more lawsuits, and therefore dramatically expanded costs at a time of shrinking tax revenues, as well as prolonged delays in filling positions that are often important to the effective provision of essential services. Petitioners' rule will also remove from elected officials and transfer to the

courts all responsibility for resolution of these sensitive disputes, notwithstanding their important implications for the communities that the elected officials represent.

Nothing in Title VII or the Equal Protection Clause requires that result. Strict scrutiny review does not apply to a reasonable decision by a government employer not to make hiring or promotion decisions on the basis of a competitive examination because of that examination's disparate impact on the basis of race, gender, or ethnicity—and instead to administer a new examination designed to ameliorate the disparate impact of the first test. And Title VII's disparate treatment principle cannot be interpreted to invalidate the very same statute's prohibition against employment practices that have a disparate impact.

Of course, if the proffered purpose is shown to be a pretext, and the employer actually was engaged in intentional racial discrimination—for example, to prevent the hiring of any employees of a particular race—then the employer will have violated Title VII and, if state action is involved, the Equal Protection Clause as well.

ARGUMENT

PETITIONERS' RIGID RULE WOULD IMPOSE HEAVY NEW BURDENS ON LOCAL GOVERNMENTS AND IS NOT JUSTIFIED BY TITLE VII OR THE EQUAL PROTECTION CLAUSE.

Municipalities hire and promote millions of workers each year subject to special constraints that private employers do not face. Municipalities are constrained by state and local civil service laws, which force many government employers to hire and

promote through competitive examinations. These examinations are designed to ensure merit-based hiring, but they often are claimed—sometimes justifiably—to violate the disparate impact component of municipal employers' obligation to engage in nondiscriminatory hiring and promotions under Title VII.

Petitioners argue that municipalities confronted with these disparate impact claims may not settle them—by invalidating the challenged examination and substituting a new test revised to eliminate or ameliorate the disparate impact—unless the challenged examination violates Title VII or there is "strong" evidence of a violation. The certain result of petitioners' rule will be the effective elimination of municipalities' ability to resolve expeditiously—and voluntarily—legitimate claims of impermissible disparate impact, whether discovered by the government entity itself or pointed out by potential Title VII plaintiffs, and dramatically increased litigation burdens for municipalities. Because a municipality would never be able to determine in advance how a particular examination would fare in a Title VII challenge, it would face the prospect of litigation challenging the examination if it did not settle and, if it chose instead to settle, litigation challenging that decision.

Nothing in Title VII or the Equal Protection Clause requires these draconian consequences. The Court's decisions make clear that—absent proof that the employer's stated goal of reducing a test's disparate impact is a pretext for refusing to hire individuals of a particular race, sex, or ethnicity—substituting one examination for another in an effort

to reduce the first examination's disparate impact violates neither Title VII nor the Constitution.

A. Millions Of Municipal Hiring And Promotion Decisions Each Year Turn On Merit-Based Criteria, Principally Competitive Examinations.

State and local governments are, together, the largest group of employers in the Nation, providing some 19.3 million of the country's 151.6 million jobs as of 2006—nearly 13% of the work force. Rose A. Woods & Eric B. Figueroa, Industry Output and Employment Projections to 2016, *Monthly Lab. Rev.* (Nov. 2007) at 53, 54. Local governments alone employ some 11 million full-time workers and an additional three million part-time workers. U.S. Census Bureau, 2007 Public Employment Data: Local Governments, http://ftp2.census.gov/govs/apes/07locus.txt (last visited Mar. 24, 2009).

According to the Bureau of Labor Statistics, there is considerable turnover each year. In 2008, local and state governments hired a total of 3.5 million workers. All but 700,000 were replacements for employees who had departed. At the end of 2008, these state and local governments were faced with over 300,000 job openings to fill.[1] On top of these hiring decisions, public employers make countless promotion decisions each year.

The vast majority of these millions of hiring and promotion decisions are subject to state or local civil

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[1] Bureau of Labor Statistics, Job Openings and Labor Turnover Survey, http://www.bls.gov/data/#employment (to retrieve data, select the "ones-screen data search" function within the Job Openings and Labor Turnover Survey Database).

service laws that require merit-based hiring and promotion.

Contemporary civil service employment systems are based on the late nineteenth- and early twentieth-century Progressive reforms designed to end corruption in government employment. New York and Massachusetts were the first to adopt such regimes. Osborne M. Reynolds, Jr., *Local Government Law* 303 (2d ed. 2001). By 1960, three-fourths of cities with populations over 10,000 had adopted a merit-based hiring and promotion system, including all cities with populations of at least a quarter million. Today, a majority of state and local government employees are covered by such provisions. *Ibid.*

These laws—which may be required by state constitution, state statute, or municipal ordinance—typically require the use of competitive examinations in hiring and promotion decisions. See, *e.g.,* Iowa Code Ann. § 400.1, 400.8-400.9 (West 1999 & Supp. 2008) (requiring competitive examinations for "cities having a population of eight thousand or over and having a paid fire department or a paid police department"); N.J. Const. Art. VII, § I ("Appointments and promotions in the civil service of the State, and of such political subdivisions as may be provided by law, shall be made according to merit and fitness to be ascertained * * * by examination, which * * * shall be competitive."); Ohio Const. Art. XV, § 10 ("Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained * * * by competitive examinations."); see also Conn. Gen. Stat. § 7-407 *et seq.* (2008) (prescribing method by

which municipalities may adopt merit hiring system).[2]

State civil service laws generally specify a similar basic structure for the examination process, though in some States, cities may adopt analogous provisions by local ordinance. The laws typically provide for a local civil service board or commission to oversee the process of formulating and administering the examinations. See, *e.g.*, Conn. Gen. Stat. § 7-410 (2008); N.Y. Civ. Serv. Law § 20 (McKinney 1999) ("Each municipal civil service commission shall prescribe, amend and enforce suitable rules for carrying into effect the provisions of this chapter.").

The rules and regulations are generally intended to provide "[f]or open, competitive examinations" and for "the filling of vacancies in offices and places of employment in accordance with the results of such examinations * * * ." Wis. Stat. Ann. § 63.25(1)(a) & (b) (West 1997 & Supp. 2008); see also Conn. Gen. Stat. § 7-409 (2008) ("The purpose of this part is to provide means for selecting and promoting each public official and employee upon the sole basis of his proven ability to perform the duties of his office or employment more efficiently than any other candidate therefor.").

The civil service board establishes basic eligibility requirements for examinations in various subject positions. These can include residency requirements or minimum levels of education. See, *e.g.*, Conn. Gen.

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[2] While merit systems are compulsory upon municipalities in many states, Connecticut makes adoption of such systems optional, prescribing a statutory form any such system must take. See Conn. Gen. Stat. § 7-407 (2008). New Haven has adopted a merit system. New Haven, Conn., Code Art. XXX (2008).

Stat. § 7-413 (2008) (permitting the commission to limit eligibility based upon "residence, age, health, habits and moral character").

The board also is responsible for preparing position-specific examinations to assess each candidate's qualifications for the relevant position, including job-based knowledge and skills. See*, e.g.*, Ohio Rev. Code Ann. § 124.23 (West 2007) ("Tests may be written, oral, physical, demonstration of skill, * * * [and] may include structured interviews, assessment centers, work simulations, examinations of knowledge, skills, and abilities, and any other acceptable testing method."); Wis. Stat. Ann. § 63.32 (West 2000). ("Such examinations * * * shall be job-related in compliance with appropriate validation standards and may include tests of physical qualifications, and, when appropriate, of manual skill."); Conn. Gen. Stat. § 7-413 (2008).

Aggrieved applicants typically may challenge the examinations before the commission certifies the results. These challenges may involve the test's substance, procedures, or outcomes. See, *e.g.*, W. Va. Code Ann. § 8-15-18a (LexisNexis 2007) ("If any applicant feels aggrieved by the answers and/or scores received on a promotional competitive examination, the commission shall * * * appoint a date, time and place for a public hearing. * * * After such review, the commission shall render a decision either in favor of the applicant, and therefore adjust the eligibility list * * * or the commission shall rule that the applicant's prior score should remain unchanged.").

The board does not appoint individuals to particular positions; rather, it certifies the examination results, creating a list of candidates eligible for promotion, rank-ordered by examination results. See,

e.g., Wis. Stat. Ann. § 63.37 (West 2000) ("[T]he board shall prepare and keep a register * * * of the persons whose general average standing upon examinations * * * is not less than the minimum fixed by the rules * * * and such persons shall take rank * * * in the order of their relative excellence as determined by examination * * * ."); Conn. Gen. Stat. § 7-414 (2008) (preparation of "eligible list"). This list is not used only for the positions open at the time the list is certified and then discarded. It may be used for hiring or promotion decisions for the particular position over a period of time. When vacancies arise, the commission sends a list of eligible candidates to the relevant appointing authority. See, *e.g.*, Conn. Gen. Stat. § 7-416 (2008) ("The appointing officer * * * shall notify the board of [any job openings], and the board shall certify to him the names * * * of a limited number of candidates * * * .").

The number of eligible candidates' names sent to the appointing authority is usually dictated by state or local law, often following the "Rule of Three," which requires the commission to forward the names of the three individuals highest on the eligibility list. See, *e.g.*, Mich. Comp. Laws Ann. § 38.413 (West 2005) ("Whenever a position * * * is to be filled * * * the commission shall certify the names * * * of the 3 candidates standing highest on the eligible list * * * ."); Conn. Gen. Stat. § 7-414 (2008) (requiring submission of "not more than three applicants having the highest rating").[3] The appointing authority must then hire or promote applicants from the names provided by the commission. See, *e.g.*, Ohio

[3] New Haven followed a variant of that rule here. See Resp. Br. 4 & n.1.

Rev. Code Ann. § 124.27(B) (West 2007) ("Appointments to all positions * * * shall be made only from those persons whose names are certified to the appointing authority[.]").

If local governments violate civil service rules, whether in devising an examination, certifying the results, or otherwise, the relevant state and local statutes typically provide a judicial remedy. See, *e.g.* *Wood* v. *Irving*, 647 N.E.2d 1332 (N.Y. 1995) (hearing an appeal in Article 78 proceeding by police officer seeking appointment as detective); *Shirokey* v. *Marth*, 585 N.E.2d 407, 413 (Ohio 1992) (finding that the firefighter could have brought a declaratory judgment action to determine his rights to promotion under the City's civil service rules and Charter); *City of Round Rock* v. *Whiteaker*, 241 S.W.3d 609, 615 (Tex. Ct. App. 2007) (holding that plaintiff is not barred from filing a lawsuit to compel the City prospectively to comply with its civil service rule regarding promotion procedures); *Simonds* v. *City of Kennewick*, 706 P.2d 1080 (Wash. Ct. App. 1985) (hearing appeal on a lower court decision enjoining the Civil Service Board from giving effect to an employment exam that violated civil service laws); *Kelly* v. *City of New Haven*, 881 A.2d 978, 981 (Conn. 2005) (approving injunction of appointment methodology inconsistent with statutory "rule of three"); *Carney* v. *Civil Service Commission*, 30 P.3d 861 (Colo. App. 2001) (invalidating municipal police promotion examination as arbitrary and capricious); *Collado* v. *City of Albuquerque*, 45 P.3d 73 (N.M. Ct. App. 2002) (ordering retroactive promotion of applicant injured

by multiple irregularities in merit promotion process).[4]

Civil service laws may not be the sole constraint governing a municipality's hiring procedures. A number of States make hiring and/or promotion standards a subject of collective bargaining—and provide that the provisions in the collective bargaining agreement are binding on local governments. Tex. Loc. Gov't Code. Ann. § 174.006 (Vernon 2008) ("A state or local civil service provision prevails over a collective bargaining contract * * * unless the collective bargaining contract specifically provides otherwise."); Conn. Gen. Stat. § 7-474(g) (2008) (permitting collective bargaining with respect to "(1) The necessary qualifications for taking a promotional examination; (2) the relative weight to be attached to each method of examination; and (3) the use and determination of monitors for written, oral and performance examinations").[5]

These civil service rules, as modified by any applicable collective bargaining agreements, effectuate the important social goal of creating a public workforce outside of the system of political patronage that dominated before the reforms adopted more than a century ago. The overlay of the examination

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[4] Potential applicants have also brought lawsuits in advance of the administration of employment examinations. See, *e.g.*, *Nolan* v. *Hillard*, 722 N.E.2d 736 (Ill. App. Ct. 1999) (successful pre-administration challenge to educational prerequisite for sitting a police sergeant examination).

[5] The City of New Haven's collective bargaining agreement with its firefighters stipulated that promotions were to be made based on an examination with written and oral components, weighted 60% and 40% respectively. Pet. App. 606a.

requirement of Title VII and other employment protections, however, poses special challenges for state and local governments.

B. Municipalities Frequently Face The Threat Of Title VII Disparate Impact Claims By Disappointed Applicants.

This Court has recognized that merit-based employment criteria may violate Title VII's disparate impact principle. *E.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Municipalities are eager to comply with their anti-discrimination obligation, for several reasons. As government entities, they have a special obligation to ensure that their actions are consistent with all applicable requirements; as representatives of diverse constituents, their hiring processes must be above challenge on grounds of favoring one group over another; and as employers, they want to be sure that their hiring and promotion processes produce the very best candidates. Ensuring that their statutorily-required merit hiring criteria satisfy these obligations is an important, and ongoing, priority for all government entities.

A local government reviewing the results of a employment test may conclude, either on its own or as a result of complaints that it receives, that the disparate impact among racial, gender, or ethnic groups triggers concern about whether the test satisfies Title VII and the other imperatives just discussed. In that situation, the local government may decide that it is appropriate voluntarily to discard the test results and substitute a revised test designed to better accomplish its objectives.

Municipalities' hiring criteria—particularly the use of examinations—also are regularly tested in

court by disappointed applicants. Invoking Title VII's disparate impact prong, plaintiffs frequently claim that merit-system examinations fall short of providing "a reasonable measure of job performance," and so fail to "measure the person for the job and not the person in the abstract." *Griggs*, 401 U.S. at 436. The result often has been costly litigation and delays in filling important government positions.

The legal standards governing disparate impact claims are not at all precise. A plaintiff must show that the challenged employment practice "causes a disparate impact on the basis of race, color, religion, sex, or national origin"; the burden then switches to the employer to prove that "the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). If the employer makes that showing, the plaintiff still may prevail by showing that the employer refuses to utilize an alternative method that has less of a disparate impact and serves the employer's legitimate interests. *Id*. § 2000e-2(k)(1)(A)(ii) & (C).

The result of these standards is that if the complaint contains a credible allegation of a disparate impact, the claim is likely to proceed to discovery. That, of course, is where the lion's share of litigation costs are incurred. See *Bell Atlantic Corp.* v. *Twombly*, 127 S. Ct. 1955, 1967 (2007) (noting Advisory Committee on Civil Rules estimate that "discovery accounts for as much as 90 percent of litigation costs when discovery is actively employed"); *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 268 (2004) (Breyer, J., dissenting) (citing survey suggesting 60% of *all* litigation costs are attributable to discovery).

The likelihood of a plaintiff being able to meet the threshold necessary to obtain discovery—and perhaps even to take to trial—a disparate impact claim relating to a competitive examination has been enhanced significantly by the approach taken by the Equal Employment Opportunity Commission (EEOC) and other federal agencies charged with enforcing Title VII in their Uniform Guidelines on Employee Selection Procedures ("Guidelines"). 29 C.F.R. § 1607.[6] Indeed, the EEOC cautions that the use of examinations to make hiring, promotion, and other employment decisions is a "practice to which the disparate impact principle frequently is applied." *EEOC Compliance Manual*, No. 915.003, § 15-28 (Apr. 19, 2006), available at http://www.eeoc.gov/policy/docs/race-color.pdf.

The Guidelines—mirroring the statutory disparate impact standard—state that an examination implicates the disparate impact principle when it adversely affects a particular racial, gender, or ethnic group by producing "[a] substantially different rate of selection in hiring" or promotion that disadvantages that group. 29 C.F.R. § 1607.16B. To help employers determine when an exam adversely affects a group, the EEOC Guidelines establish a "four-fifths" rule of thumb. 29 C.F.R. § 1607.4D. Under that rule, an examination is presumed to have an adverse impact if the ratio of minority test-takers eligible for appointment to a position is less than 80% (four-

[6] The Guidelines were jointly issued by EEOC, the Department of Justice, the Department of Labor, and the Civil Service Commission (now the Office of Personnel Management). They "are not administrative regulations" but "are 'entitled to great deference.'" *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 431 (1975) (citing *Griggs*, 401 U.S. at 433-434).

fifths) of the ratio of non-minority test-takers so eligible. *Ibid.*[7]

The fourth-fifths rule of thumb is not simply a possible trigger for federal enforcement action; it also provides disappointed applicants with a strong basis for threatening litigation challenging a municipality's use of a particular examination. And the chances are strong that a lawsuit alleging a violation of the four-fifths rule would not be dismissed at the pleading stage, and therefore would trigger significant litigation burdens, disruption of employment processes, and adverse publicity for the defendant municipality.[8]

The threat of disparate impact litigation involving competitive examinations is not at all hypothetical. Municipalities have faced a considerable number of disparate impact claims based on examinations brought by disappointed minority applicants. See, *e.g.*, *Lewis* v. *City of Chi.*, 528 F.3d 488 (7th Cir. 2008) (African American firefighters challenged promotion exam); *Adams* v. *City of Chi.*, 469 F.3d 609 (7th Cir. 2006) (minority police officers challenged

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[7] Suppose 120 applicants took an examination, and that 48 out of the 80 white applicants had scores making them eligible to be hired, while 12 out of 40 black applicants would be eligible. The "selection rate" for white applicants is 60% (48/80), while the rate for black applicants is 30% (12/40). The black selection rate is one-half of the white selection rate. Where that ratio is lower than four-fifths, an examination fails the EEOC's rule of thumb.

[8] The four-fifths rule is not a binding standard for determining whether a plaintiff has satisfied his or her initial burden in a disparate impact case (see *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 995 n.3 (1988)), but it does provide a powerful argument against dismissal of a case on the pleadings.

lenged promotion exam); *Gulino* v. *New York State Educ. Dept.*, 460 F.3d 361 (2d Cir. 2006) (African American and Latino teachers challenged use of standardized certification test); *Isabel* v. *City of Memphis*, 404 F.3d 404 (6th Cir. 2005) (African American police officers claimed discriminatory promotions); *Allen* v. *City of Chi.*, 351 F.3d 306 (7th Cir. 2003) (minority police officers challenged promotions process); *Johnson* v. *City of Memphis*, 73 Fed. Appx. 123 (6th Cir. 2003) (African American and Hispanic patrol officers claimed section of promotion exam was reweighed to adversely affect minorities); *Bryant* v. *City of Chi.*, 200 F.3d 1092 (7th Cir. 2000) (African American and Latino officers challenged promotion exam); *Firefighter's Inst. for Racial Equal.* v. *City of St. Louis*, 220 F.3d 898 (8th Cir. 2000) (African Americans challenged promotional test); *Mems* v. *City of St. Paul, Dep't of Fire and Safety Servs.*, 224 F.3d 735 (8th Cir. 2000) (African American firefighters challenged promotion exam); *St. Louis Fire Fighters Ass'n Int'l Ass'n of Fire Fighters Local 73* v. *City of St. Louis,* 96 F.3d 323 (8th Cir. 1996) (challenge to promotion exam as having an adverse impact on African Americans); *Bridgeport Guardians, Inc.* v. *City of Bridgeport*, 933 F.2d 1140 (2d Cir. 1991) (minority police officers challenged promotion exam); *Black Law Enforcement Officers Ass'n* v. *City of Akron*, 824 F.2d 475 (6th Cir. 1987) (African American officers challenged promotion policy and exam); *Gilbert* v. *City of Little Rock,* 799 F.2d 1210 (8th Cir. 1986) (African American officers challenged promotion exam); *Fudge* v. *City of Providence Fire Dept.*, 766 F.2d 650 (1st Cir. 1985) (African American candidate challenged hiring exam for firefighting training academy); *Kirkland* v. *New York State Dep't of Corr. Servs.* 711 F.2d 1117 (2d Cir. 1983) (minority

correction officers filed class action challenging promotional exam); *Wilmore* v. *City of Wilmington*, 699 F.2d 667 (3d Cir. 1983) (minority firefighters challenged promotion exams); *Hood* v. *New Jersey Dep't of Civil Serv.,* 680 F.2d 955 (3d Cir. 1982) (challenge to civil service exam by African American and Hispanic applicants for fire department); *Ass'n Against Discrimination in Employment* v. *City of Bridgeport*, 647 F.2d 256 (2d. Cir. 1981) (African American and Hispanics challenged hiring exam for fire department); *Guardians Ass'n of New York City Police Dep't* v. *Civil Serv. Comm'n*, 630 F.2d 79 (2d Cir. 1980) (African American and Hispanics challenged police department hiring exam).

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This Court must take account of these very significant practical realities as it considers the standards advanced by the parties in this case.

C. Petitioners' Rigid Rule Effectively Eliminates Municipalities' Ability To Avoid Litigation Over Employment Decisions And Will Increase Their Costs As Well As The Delays In Filling Positions.

Petitioners' principal contention (Br. 43, 46) is that a local government may decline to use the results of an examination only if it is certain that use of the results would violate Title VII. Alternatively, they assert (Br. 49) that a "strong basis in evidence" for a Title VII violation is necessary.[9] Those stan-

[9] Petitioners also assert (Br. 43, 46, 49) that Title VII requires an employer to use the results of an examination even if the examination violates Title VII. We agree with the United States (Br. 4, 13) and respondents (Br. 15-18) that this argument can-

dards are inconsistent with this Court's precedents (see pages 32-33, *infra*), and—if adopted—would produce draconian practical consequences for municipal employers.

Under petitioners' approach, a municipality would be virtually unable to avoid litigation with respect to a dispute over the validity of an examination. Agreeing to devise a new examination in order to compromise a claim by minority applicants challenging a test on disparate impact grounds would subject the municipality to liability in an action by majority applicants eligible for appointment on the basis of the disputed test—the latter group would assert that no Title VII violation, or "strong basis in evidence" of a violation had been made.

Municipalities therefore would be forced to defend any examination they administer—no matter how unjustifiable the questions contained in the exam; no matter how disparate the burden on a particular racial, gender, or ethic group; and no matter how easily an alternative test with a significantly reduced disparate impact could be devised. Failing to dispute the disparate impact plaintiffs' claim of discrimination would simply produce a new lawsuit challenging the municipality's decision to compromise. Only in the unlikely situation in which the applicants eligible for hiring or promotion under the disputed examination agreed with the challengers that the examination should be discarded would the municipality be free to act without seeing the litigation through to completion.

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not be reconciled with the statutory text or this Court's decisions construing Title VII.

Petitioners' alternative "strong basis" standard does nothing to address this problem. It would be impossible for a municipality to determine in advance whether a particular set of facts will subsequently be found to constitute a "strong basis." Indeed, given its indeterminate nature, that standard probably would be *more* likely to provoke litigation in the event a municipality decided to compromise a disparate impact claim.

The additional burden that petitioners' rule would impose on municipalities is quite substantial. This Title VII litigation is fact-intensive and expensive to defend. Especially when the plaintiff is able to show that the examination results violate the EEOC's four-fifths rule, the chances are slim of obtaining a defense judgment before full discovery is completed. All sides typically will be able to find testifying experts to both "validate" and "invalidate" the test in relation to the relevant job-related criteria, as well as to argue, respectively, that there is not, or there is, an alternative available that will produce a lesser disparate impact. See *In re Chi. Police Officer Promotions*, 1994 WL 424146 (N.D. Ill. Aug. 11, 1994) (noting that the City had never successfully defended a promotion test resulting in racially disparate impact on the basis of job-relatedness or overall validity); see also *Allen*, 351 F.3d 306; *Hamer* v. *City of Atlanta*, 872 F.2d 1521 (11th Cir. 1989); *Rivera* v. *City of Wichita Falls*, 665 F.2d 531 (5th Cir. Unit A Jan. 1982).

The history of litigated cases shows that expanding municipalities' litigation burdens to include *virtually every case in which there is a dispute*, will divert significant government resources into litigation—Title VII employment discrimination cases can

run for years even when employers prevail. See, *e.g.*, *Lewis*, 528 F.3d 488 (involving eleven years of litigation over the fire department's hiring plan); *Allen*, 351 F.3d 306 (involving five years litigation over the police department's written test); *Chi. Firefighters Local 2* v. *City of Chi.*, 249 F.3d 649 (7th Cir. 2001) (involving fourteen years of litigation over the City's affirmative action plan); *Bryant* v. *City of Chi.*, 200 F.3d 1092 (7th Cir. 2000) (involving five years of litigation over whether the City could use an alternative hiring procedure).

The potential number of such claims is enormous. As we have discussed, municipalities make millions of hiring and promotion decisions each year, and most involve merit-based decisionmaking using techniques such as examinations. Under petitioners' view of the law, every disparate impact claim challenging an examination must be litigated to conclusion—or the municipality would face a lawsuit from those seeking to retain the examination.

This diversion of resources will have especially severe consequences, given the profound impact of the current financial crisis on state and local governments. States face a budget shortfall of billions of dollars—as much as 17% of their ordinary budgets—now, a shortfall projected to get worse in the next two fiscal years. See Elizabeth McNichol & Iris J. Lav, Ctr. on Budget & Policy Priorities, *State Budget Troubles Worsen*, at 1 (Mar. 13, 2009), http://www.cbpp.org/files/9-8-08sfp.pdf. The aggregate state budget shortfall is estimated at $350-370 billion through fiscal year 2011. *Id.* at 2. In response to this extraordinary budget pressure 83% of cities have cut expenditures and services; 69% have already laid off employees. Chris Hoene, Nat'l League of Cities,

Fiscal Outlook for Cities Worsens in 2009 at 1 (Feb. 2009), http://www.nlc.org/ASSETS/1F73FD6DD09249DB9B2FD014AA4D9C16/CFC_InterimSurvey_09.pdf.

While the lawsuits proceed, moreover, the local government may be precluded from filling the affected positions, with significant adverse effects on the delivery of important public services. Although the municipality may contest preliminary injunctive relief on the ground that filling the vacant positions is essential to the public interest, there is no certainty that a court will agree with the local government's submission that the public interest outweighs the plaintiff's interest in maintaining a job opening.

Finally, requiring that the issue be litigated to a judgment in every case prevents the political process from seeking to resolve more expeditiously what can often be a difficult and inflammatory issue. In its role as both employer and sovereign, government must take care to structure its actions with the utmost fairness towards its individual employees and towards its citizens at large, with a special sensitivity towards the underlying and fundamental goals of equality and accountable government. The time-consuming nature of litigation means that these potentially quite divisive issues instead will fester while the litigation proceeds.

This is not to say that the political process should be free of any constraints in resolving these sorts of disputes. The Court's precedents impose clear limits, as we discuss below (at pages 34-35)—particularly the prohibition against disparate treatment imposed by Title VII. But petitioners' approach requires government employers to continue blindly to defend every examination they administer no matter how

clear it becomes that the examination was improper under Title VII.

The Court therefore should adopt a legal standard that accords municipalities reasonable flexibility in determining how to address claims that examinations are invalid under Title VII's disparate impact principle. Upholding petitioners' proposed rule would impose new, and potentially very substantial, costs as well as other burdens on the many government entities that are required by law to use employment or promotion examinations.

D. Neither The Equal Protection Clause Nor Title VII Support Petitioners' Rigid Rule.

Petitioners' legal argument rests entirely on their assumption (*e.g.*, Br. 19, 23) that any decision relating to employment that is in any way motivated by race is subject to strict scrutiny under the Equal Protection Clause and constitutes disparate treatment in violation of Title VII.

If petitioners were correct, however, a government decision to undertake facially neutral measures specifically to increase the number of minority job applicants or the number of minority contractors bidding on a project would be unlawful. After all, a government decision to undertake those efforts indisputably would be race conscious in that the government's purpose would be increasing the number of *minority* applicants.

A plurality of this Court reached precisely the opposite conclusion in *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989). After holding invalid, under strict scrutiny review, a statute reserving a fixed percentage of government contracts to minority

contractors, the plurality observed that the City of Richmond could, without incurring strict scrutiny review, eliminate "formal barriers to new entrants" that "may have a disproportionate effect on the opportunities open to new minority firms"; the "elimination or modification" of those procedures "would serve to increase the opportunities available to minority business without classifying individuals on the basis of race." *Id.* at 510 (O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.).

Justice Kennedy's controlling opinion in *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 127 S. Ct. 2738, 2792 (2007), also rejects the approach advocated by petitioners, stating:

> In the administration of public schools * * * it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.

Examples of such "race-conscious" policies cited by Justice Kennedy included "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; [and] recruiting students and faculty in a targeted fashion." *Ibid.*

The Court's decisions under the Voting Rights Act reflect the same principle, acknowledging that "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race." *Bush* v. *Vera*, 517 U.S. 952, 958 (1996) (plurality opinion); see also *League of United Latin American Citizens* v. *Perry,* 548 U.S. 399 (2006) (State's dismantling of a majority-minority district unconstitu-

tional on the grounds that it contravened the political identity that minority voters had found within that district); *Bartlett* v. *Strickland*, No. 07-689 (Mar. 9, 2009).

And Members of the Court have indicated that a facially race-neutral college admission standard—such as a rule guaranteeing admission to a fixed percentage of the top graduates from each high school within a State—is not subject to strict scrutiny even though it is adopted for the race-conscious purpose of achieving diversity in the student body. *Grutter* v. *Bollinger*, 539 U.S. 306, 361-362 (2003) (Thomas, J., joined by Scalia, J., concurring in part and dissenting in part); *Gratz* v. *Bollinger*, 539 U.S. 244, 297-298 (2003) (Souter, J., joined by Ginsburg, J., dissenting).

These decisions provide considerable guidance regarding the line between government actions that are presumptively permissible and those that are subject to strict scrutiny. *First*, the presence of a race-conscious motivation for the government action is not sufficient by itself to trigger strict scrutiny. As Justice Kennedy stated in *Parents Involved*, "a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races." 127 S. Ct. at 2792; see also *ibid*. (stating with respect to specific "race conscious" government actions listed as examples that "it is unlikely any of them would demand strict scrutiny to be found permissible"); *Bush* v. *Vera*, 517 U.S. at 958 (plurality opinion) (same).

Second, it is the nature of the government action that is the critical factor. Where a government action directly and explicitly singles out particular individuals—"treating each [person] in different fashion solely on the basis of a systematic, individual typing

by race" (*Parents Involved*, 127 S.Ct. at 2792 (Kennedy, J.)—it triggers strict scrutiny. Accord, *id.* at 2797 ("To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society."); *Croson*, 488 U.S. at 510 (plurality opinion) (O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.) ("classifying individuals on the basis of race"). If, by contrast, the government "mechanisms * * * do not lead to different treatment based on a classification that tells each student he or she is to be defined by race," they do not trigger strict scrutiny. *Parents Involved*, 127 S.Ct. at 2792 (Kennedy, J.).[10]

One important consideration in determining the category in which a challenged government action falls is whether it is a classification "based on racial typologies" that "can cause a new divisiveness." *Parents Involved*, 127 S.Ct. at 2797 (Kennedy, J.).

Application of these principles in the employment context leaves no doubt that an employer's decision to replace one test with another because of a reasonable belief that the first test violated the disparate impact principle is not subject to strict scrutiny and does not violate Title VII. Of course, if the proffered purpose is shown to be a pretext, and the employer actually was engaged in intentional racial discrimination—for example, to prevent the hiring of any employees of a particular race—then the employer will have violated Title VII and, if state action is involved, the Equal Protection Clause as well. See

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[10] The mere fact that a challenged government action may have a disparate impact is not sufficient to invoke strict scrutiny. *Washington* v. *Davis*, 426 U.S. 229, 248 (1976).

St. Mary's Honor Ctr. v. *Hicks*, 509 U.S. 502, 511 (1993).[11]

1. The Equal Protection Clause does not subject to strict scrutiny review a reasonable effort to ameliorate an examination's disparate impact.

A reasonable decision by a government employer not to make hiring or promotion decisions on the basis of a competitive examination because of that examination's disparate impact on the basis of race, gender, or ethnicity—and instead to administer a new examination designed to ameliorate the disparate impact of the first test—is fundamentally different from the actions at issue in *Croson* and *Parents Involved*.

The decision to administer a new test is not a final decision regarding the plaintiffs' entitlement to

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[11] Much of the discussion in petitioners' brief relates to claims that respondents' actions were politically motivated, in violation of Connecticut's civil service law. See, *e.g.*, Br. 5-6. But that provides no justification for upholding a challenge based on Title VII or the federal Constitution, especially because Connecticut—like other States (see pages 10-11, *supra*)—provides its own remedy for violations of civil service procedures. See, *e.g.*, *Kelly*, 881 A.2d at 978 (challenging the new methodology of rounding exam scores as violations of the civil service laws and the City's Charter); *Hurley* v. *City of New Haven*, 2006 WL 1609974 (Conn. Super. May 23, 2006) (seeking declaratory relief and an injunction against the entry-level hiring practices that allegedly violate the City's Charter); *Henry* v. *Civil Service Comm'n*, 2001 WL 862658 (Conn. Super. July 3, 2001) (contending hiring process violated the City's Charter and seeking injunctive relief); *Bombalicki* v. *Pastore*, 2001 WL 267617 (Conn. Super. Feb. 28, 2001) (asserting that the failure to promote the plaintiff to the rank of lieutenant in the New Haven Police Department violated the City's Charter).

the government benefits they seek. In contrast to the students and contractors in those cases, who had been denied admission to the schools of their choice and the contracts for which they competed, plaintiffs here remain just as eligible to obtain the promotions as any other applicant taking the revised examination.

It therefore is impossible to conclude that an employer's decision to conduct a second examination "treat[s] each [person] in a different fashion solely on the basis of a systematic, individual typing by race." *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J.). To the contrary, the decision treats each person in the same manner, requiring—as well as permitting—every single applicant to take the revised examination to be eligible to be hired or promoted.

Any "labeling" that occurs here relates to the test (and its potential violation of the disparate impact principle), not to the individual applicants. The government's conclusion that the test should not be used because of *the test's* disparate impact says nothing about the individuals who took the test, especially because each individual will compete on a level playing field in taking the revised test. And this Court's decisions make clear that the fact that the government decision is race conscious is not sufficient to trigger strict scrutiny.

Dramatic adverse consequences would result from application of strict scrutiny to modification of an incomplete government decisionmaking process—maintaining all applicants' ability to compete on a level playing field—in a reasonable effort to eliminate a potential legal infirmity that could invalidate that process. Governments would effectively lose their ability to adjust flawed decisionmaking proc-

esses once underway, because of the high hurdle erected by the strict scrutiny standard, and would be forced instead to follow them to conclusion, face the inevitable lawsuit and associated costs, and revise the process only after a judicial determination of wrongdoing. That not only would impose large costs, but also reduce if not eliminate municipalities' ability to correct their own mistakes.

What if a government employer seeking to fill a position not subject to an examination requirement found after conducting a round of interviews that the top five candidates were all men? On petitioners' theory, the employer could not engage in additional, targeted outreach to obtain additional female applicants without satisfying strict scrutiny review. As here, the top candidates would have been identified and the new government process could displace any or all of them from their ranking. Presumably, petitioners' rule would bar that process adjustment as well—even though the five finalists would compete on an equal basis with any additional female candidates. Such a straitjacket makes no sense, and is not required by the Equal Protection Clause.

Moreover, it is petitioners' strict scrutiny approach—and not the government decision to revise the test—that would "cause a new divisiveness" if endorsed by this Court. *Parents Involved*, 127 S.Ct. at 2797 (Kennedy, J.). The demanding strict scrutiny standard would not apply to a local government's decision not to use an examination for other reasons—for example, a conclusion that it failed to test appropriately for an important qualification or that there had been some breach in security, or that there were no longer sufficient funds available to fill the rele-

vant positions.[12] Only decisions to try to reduce a disparate impact on a particular racial, gender or ethnic group would be affected. That would send a strongly negative message to persons who are members of those groups.

Petitioners contend (Br. 25-26) that strict scrutiny must apply because those applicants ranked the highest based on the results of the examination here are identifiable individuals who will lose their ranking if the government is permitted to utilize a revised test. Because the government decision to revise the examination rests on the race of these individuals, the argument goes, strict scrutiny must apply.

The flaw in this contention is that all of the government actions not subject to strict scrutiny discussed above also affect particular individuals. When the government draws the geographic lines that allocate students among a district's schools, the decision to place the boundary on one street rather than another may well be based on the desire to increase one

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[12] Civil service commissions have broad authority to set aside examinations for a variety of reasons. 3 Eugene McQuillin, *The Law of Municipal Corporations* § 12.78.15 (2008) ("If it is determined by the commission that an examination did not afford the applicants a fair opportunity to demonstrate their abilities, the commission may cancel the examination [and] request the director of civil service to hold a new examination."); *DiRado* v. *Civil Service Comm'n*, 224 N.E.2d 193, 195 (Mass. 1967) (commission may cancel an examination that "did not afford the applicants a fair opportunity to demonstrate their abilities"); see also 2 John Martinez & Michael Libonati, *Local Government Law* § 10:17 (2008) ("Error in the conduct of an examination may be cured by ordering another examination or by ordering the acceptance of alternative answers."); *Katz* v. *Hoberman*, 272 N.E.2d 81 (N.Y. 1971) (cancellation of a promotional examination using questions previously made public).

school's minority population and to decrease the minority population of the neighboring school. The affected students are identifiable—they are the residents of the houses and apartment buildings on the blocks allocated to the first school rather than to the second. But the facts that those students are identifiable, and that the government decision was based in part on those students' race, does not subject the boundary-drawing decision to strict scrutiny.

The same analysis applies to the decision to place a special "magnet" program in one school rather than in another. The placement decision may be based on the racial composition of the two schools: The school district may conclude that putting the program in school A rather than school B is appropriate because—in light of the racial composition of school A—the students attracted by the program will produce a more diverse student body.

In that example, the government decision rests on the racial composition of school B's students (and of school A's students), both identifiable groups of individuals. But that fact does not subject the decision to strict scrutiny.

The very same arguments apply to political districting. Under petitioners' approach, because it is possible to identify the particular individuals affected by a decision to place a district line in one place rather than another, that decision should be subject to strict scrutiny. But that rationale would apply to all districting, and completely overturn this Court's determination that mere consciousness of

race in districting decisions is *not* sufficient to trigger strict scrutiny review.[13]

A related aspect of petitioners' argument is their focus on the decision to replace an examination that had been administered. Petitioners appear to recognize (Br. 41) that—prior to administering a test—a government employer may seek to determine whether the examination would have a disparate impact on the basis of race, gender or ethnicity and, if such an impact is indicated, revise the examination to ameliorate it. Once the test is administered, however, they assert that any decision not to utilize its results must be reviewed under a strict scrutiny standard.

But petitioners' argument would mean that a school district's decision to redraw school boundaries in order to maintain diverse student bodies in individual schools in light of changing residential patterns also would trigger strict scrutiny review. After all, that decision would transfer identifiable students from one school to another based on the racial composition of the blocks on which the students live. And the same conclusion would apply to a decision to move a special "magnet" program from one school to another based on diversity considerations.

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[13] The relatively small number of applicants who took the test at issue here is not typical of the government employment setting. Hundreds, and sometimes thousands, of applicants sit for particular competitive examinations administered by some local governments. Just as the applicability of strict scrutiny review is not affected by the fact that students may be more "identifiable" with respect to some changes in geographic boundaries in small school districts, it should not be affected by the relative "identifiability" of the individuals here.

Because all existing schools by definition have an assigned geographic area from which they draw their students (other than schools whose student bodies are based on non-geographic criteria), that result would as a practical matter mean that strict scrutiny review would apply to *any* redrawing of such lines. That is precisely the opposite of Justice Kennedy's conclusion in *Parents Involved*. And that same conclusion would apply with respect to the redrawing of legislative districts as well, because such revisions also move particular individuals from one district to another. Under petitioners' approach, the principle endorsed by the plurality in *Bush* v. *Vera* would be a dead letter.

2. Title VII's disparate treatment provisions do not prohibit voluntary compliance with the statute's own disparate impact principle.

Title VII's prohibition of employment decisions "because of [an] individuals' race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a)(1), is not violated by an employer's reasonable decision to revise an examination in order to avoid its invalidation under Title VII's disparate impact principle for the same reasons that such a decision does not trigger strict scrutiny review.

Congress included both disparate treatment and disparate impact prohibitions together, in the same piece of legislation. Because "[s]tatutes must 'be read as a whole,'" *United States* v. *Atlantic Research Corp.*, 127 S. Ct. 2331, 2336 (2007) (quoting *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)), the Court should not interpret one part of Title VII to prohibit the operation of another part. Yet that is the essence of petitioners' claim.

As we have explained, however, the decision to ameliorate the disparate impact of an examination—and allow all applicants to retake the revised test—is not discrimination based on race under this Court's precedents. For the same reasons it does not trigger Title VII's disparate treatment prohibition.

Moreover, employers need some latitude to decide whether or not to incur the large sums associated with defending a test in court, including hiring experts to "validate" the test. That need is especially acute because the uncertainty surrounding Title VII litigation means that even a test validation does not always shield employers from Title VII disparate impact liability. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 429-432 (1975) (holding that the use of a validated test violated Title VII's disparate impact prohibition).

Especially because "on numerous occasions [the Court has] recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII," *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 515 (1986), it would render Title VII incoherent to read the disparate treatment prohibition to outlaw voluntary compliance with the statute's disparate impact provisions. See U.S. Br.10-15.

3. An employer that invokes ameliorating an examination's disparate impact as a pretext for denying a job or promotion based on an applicant's race is subject to liability under Title VII and, if a state actor, the Constitution.

Neither a plaintiff nor a court is required to take at face value an employer's claim that its decision not to certify the results of an examination was because it wished to ameliorate the disparate impact of the examination by utilizing a revised examination instead. As in other contexts, the plaintiff may seek to show that the justification advanced by the employer is a pretext and that the employer's actual motivation was to deny a job or promotion to particular applicants because of those applicants' race. *St. Mary's Honor Ctr.*, 509 U.S. at 511; cf. *Johnson* v. *Transp. Agency*, 480 U.S. 616, 626 (1987) (if the employer invokes its affirmative action plan as the basis for its decision, "the burden shifts to the plaintiff to prove that the employer's justification is pretextual").

To prevail on such a theory here, petitioners would be required to prove that respondents' purpose in fact was *not* to substitute a test with a lesser disparate impact in order to avoid a lawsuit claiming that the test violated Title VII or to increase the possibility of obtaining a more diverse workforce.

Evidence relevant to such a claim would include proof that the decisionmaker had no reason to believe that the discarded test had a disparate impact on one or more racial, gender, or ethnic groups or that the decisionmaker had no reason to believe that it was possible to devise a test with less of a dispa-

rate impact. For example, evidence that the employer had discarded a previous test for the same reason, devised and administered a substitute test, achieved similar results, and now sought to discard the substitute test might—without more—undercut the proffered motivation. Evidence that the employer had not even considered whether an alternative test might be available also might be probative on this point.

If petitioners were able to make that showing, they also would be obligated to demonstrate that respondents' actual purpose was the intentional discrimination prohibited by the Constitution—refusing to promote applicants of a particular race so respondents could reserve the promotions only for applicants of another race.

We agree with respondents (Br. 36-39) that petitioners have not carried their burden of proof here. If the Court were to reach a contrary conclusion, the appropriate course would be to remand the case for further proceedings limited to the pretext claim.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 2009